in the Supreme Court of the United States

October Term, 1975

NO. 75-1379

CHARLES DAVID MEYER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

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AUTHORITIES CITED

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CHARLES DAVID MEYER, Petitioner herein, by his undersigned attorney, respectfully prays that this Honorable Court issue its Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit dated December 5, 1975; the Order of the same Court denying a Petition for Rehearing and a Petition for Rehearing en banc dated February 19, 1976.

OPINIONS OF THE COURT BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, affirming the United States District Court for the Northern District of Georgia, Atlanta Division, in this cause is reported in _____ F.2d 735. Said opinion was delivered on December 5, 1975, a copy is attached as Appendix A.

JURISDICTION

Jurisdiction of the Court is invoked under 28 United States Code §1254(1).

QUESTIONS PRESENTED

I

WHETHER THE CONGRESSIONAL DELEGATION OF AUTHORITY TO THE ATTORNEY GENERAL TO REGULATE THE SCHEDULING OF PROSCRIBED DRUGS IS VOID AS AN UNCONSTITUTIONAL DELEGATION OF AUTHORITY.

II

WHETHER A DIRECTED ACQUITTAL ON A CONSPIRACY CHARGE BARS A JUDGMENT OF CONVICTION ON A SUBSTANTIVE CHARGE WHEN THE FACTS NECESSARY TO PROVE EACH CHARGE ARE IDENTICAL AS DISCLOSED BY THE RECORD PRIOR TO THE DIRECTED JUDGMENT OF ACQUITTAL.

III

WHETHER TANGIBLE OBJECTS MAY BE ADMITTED INTO EVIDENCE WITHOUT PROOF THAT THE ORIGINAL ACQUISITION FORGES CONNECTION WITH THE ACCUSED.

IV

WHETHER THE GOVERNMENT HAS THE BURDEN OF MAINTAINING OBJECTS SOUGHT TO BE INTRODUCED INTO EVIDENCE IN THEIR ORIGINAL CONDITION TO THE TIME OF TRIAL SO THAT THE JURY MAY DETERMINE THE CREDIBILITY OF THE WITNESSES THROUGH WHOSE TESTIMONY THE ADMISSION INTO EVIDENCE OF THOSE OBJECTS IS SOUGHT.

UNITED STATES CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved in this Petition is the United States Constitution Article I, Section I, attached as APPENDIX B; and U.S.C.A., Title 21, Sections 811(1)(2)(b), 812, 841, 844, 846, 952, 960 and Title 18, Section 371, attached as APPENDIX B.

STATEMENT OF THE CASE

On March 5, 1974, Criminal Indictment #74-100 was returned against CHARLES DAVID MEYER, David John Busard and Stuart Levine.

The Indictment sounded in two counts. Count One was a conspiracy count alleging violations of 21 U.S.C. §841(a)(1), 21 U.S.C. §844 and 21 U.S.C. §846. Eight overt acts were specified at the termination of the language charging the conspiracy itself.

Count Two accused CHARLES DAVID MEYER and David John Busard of aiding and abetting each other by knowingly and willingly possessing with intent to distribute a controlled substance (cocaine) in violation of §841(a), Title 21 U.S.C.

Defendant was arraigned on March 22, 1974, in the United States District Court in Atlanta and entered his plea of Not Guilty. (R 521).

Thereafter, commencing October 7, 1974, the case was tried by a jury before the Honorable Richard C. Freeman, District Judge.

The trial continued until October 10, 1974. On motion of Defendants, CHARLES DAVID MEYER and David John Busard at the close of the case, a judgment of acquittal was returned by the court as to Count One (the conspiracy count). (R 595-596)

On October 10, 1974, the jury returned its verdict of guilty on Count Two as to Defendant MEYER as well as defendant Busard. (R 627-628)

Motions for new trial were then filed (R 630-638) and an order of denial was entered by the court. (R 638)

MEYER'S judgment and commitment were entered on November 22, 1974. (R 640) His notice of appeal was filed on November 22, 1974. (R 645)

THE FACTS PERTINENT TO THIS PETITION ARE:

Petitioner was introduced to John Graham and made arrangements with Mr. Graham to use his house. Graham contacted the D.E.A. Graham did not know who brought a Tupperware container into his house that he was told held cocaine. He believed that both Petitioner and the co-defendant, Busard, went to the car to get it to bring it into the house. It was placed in the refrigerator. Mr. Graham did not see Petitioner after that occasion. At a later point, D.E.A. agents arrested co-defendant Busard and discovered at Graham's house a Tupperware container. The container was introduced into evidence over the objection of both defendants. Mr. Graham admitted that the contents of the container might have been replaced many times as far as he knew. He never made any identification of the Tupperware container located in front of the jury box. He was never asked to make such an identification.

Petitioner was arrested, searched and re-searched, but nothing of any illegal nature was found on him, and he was not arrested in the home of John Graham nor any where else where the drugs put into evidence were found.

The D.E.A. agent testified as to the condition of the evidence put before the jury as being different from its condition at the time he seized it at Graham's house.

REASONS FOR GRANTING CERTIORARI

I

Title 21 U.S.C. Section 952 makes it unlawful to bring certain substances into the United States or possess certain substances in the United States. These substances are listed in the controlled substance schedule found in 21 U.S.C. §812. The authority to control the substances is found in 21 U.S.C. §811.

Petitioner challenges the validity of 21 U.S.C. §811 on the grounds that it constitutes a delegation of legislative power not permitted by Article I, Section I of the Constitution in that the Attorney General has the responsibility of adding or deleting substances from the schedule or transferring substances between schedules based on recommendations from the Secretary of Health, Education and Welfare; or if no recommendation is made, based on his own evaluations.

These changes affect the penalties provided for the violations of the statute which are referred to by schedule under 21 U.S.C. §960. The standards for classification in the different categories do not meet the required standards for proper delegation of legislative power. The guidelines such as "high potential for abuse" are inadequate and do not meet the standards discussed by this Court in *Panama Refining Company v. Ryan*, 293 U.S. 388, 55 S.Ct. 241 (1935). In *United States v. Westlake*, 480 F.2d 1235, (5th

Dist. Ct. App. 1973), the same question was raised. At that time no changes had been made in the schedules which were part of the act. The court held that the question was premature in view of the fact that *Westlake*, supra, had not been affected. However, since *Westlake*, changes have been made so that the question of illegal delegation of authority is real. The Appendix contains the original five schedules and modified schedules subsequent to *Westlake*.

II

The trial court recognized that there was no way that co-defendant of Petitioner, Busard, could have been tied into the conspiracy (TR 479 and 481). The U.S. Attorney then pointed out that the court, by the same token, was holding that there was insufficient evidence to tie Petitioner into a conspiracy (TR 483). The court then entered judgment of acquittal on Count I (TR 484). It denied acquittal on Count II which had been raised and argued before the court prior to and at that time.

As the Court recognized in *United States v. Sealfon*, 332 U.S. 575 (1948), although a substantive offense and conspiracy may both be prosecuted, a determination of the conspiracy charge concludes those matters in issue which the verdict determined, though the offenses be different.

Since Petitioner was never found in personal possession of any controlled substance, his only connection to the possession of his co-defendant could be through the aiding and abetting language describing the manner of his possession, (as the United States Court of Appeals, Fifth Circuit, explained the substantive offense in their opinion).

The Assistant Attorney General, Mr. Turner, (TR 408-409) stated:

> "No, an aider and abettor is not" (referring to a co-conspirator). "An aider and abettor is a person who attempts to help someone further a plan or to do something to further someone else's interest. To do that, you have to know what the interests are to do it knowingly and you have to participate in it with the intent to make it a success. The difference between aiding and abetting and conspiracy in my book is non-existent."

Since the manner of possession of which Petitioner was charged and the issues of conspiracy are one and the same, the latter being resolved in favor of Petitioner at the close of the State's case, the substantive charge should also have been dismissed and acquittal granted for Petitioner at that time.

III

The chain of custody once the Drug Enforcement Agency's agent, Kelly Goodowens, seized the container may have been established. But, it was not seized from the Petitioner and there was no testimony at trial connecting the Tupperware container before the court to the container which John Graham stated was brought into his house by either the Petitioner or the co-defendant at trial.

The case of *United States v. Montalvo*, 271 F.2d 922, 925 (2nd Cir., 1960) cert. denied 361 U.S. 961 (1960), cited in Brief of Appellee and the opinion of the United

States Court of Appeals, Fifth Circuit, discussed testimony linking the evidence in that case, to wit; a brown paper bag containing heroin to the defendants, by the best evidence available, the observations by the D.E.A. officers who saw the bag in the defendant's possession. In the case now before the court, testimony comparable to the D.E.A. agent's testimony in *Montalvo*, supra, was also available, but was not elicited John Graham did not state that the container before the court was similar (in size and shape) and appeared to be the one claimed to be handled by the Petitioner. He did not testify as to the container at all. There was no proof of the original acquisition from the Petitioner when the one person who could have given that proof sat a few feet away from the object in question.

Furthermore, from the testimony of both John Graham and Agent Grey, the appearance of the contents of the Tupperware container differed. It is clear that the contents seized by the D.E.A. agents and the contents as originally viewed by John Graham were not the same. Therefore, there was a logical break in any inference connecting the Petitioner to the container at trial.

IV

An exhibit should not be permitted in evidence, if it is presented to the jury and witnesses for identification, in a manner substantially different than when the crime was committed. In this case it would have been impossible for the jury and especially John Graham to conclude that the cocaine testified to by the forensic chemist, Mr. Charles Clark, was that substance in the container which had been originally observed by the witness Graham.

Graham's description of what he saw could not conceivably have been the same exhibit or at least not in the same condition as that described by Agent Grey. Graham testified (TR 268):

> "Well the container is of a clear substance, a Tupperware container and you could see a white powder visible through the lid of the container."

Agent Grey, in contrast, testified that when he first saw the Tupperware container, which he had received from Goodowens,

> ". . . approximately ninety-four grams gross of white powder contained in a plastic bag, further contained in metal foil, further contained in plastic wrap, and it was further contained in a clear plastic bag."

He pointed out that that was the *mode* of containment at the time he was first given the Tupperware container (TR 371-372).

Grey also testified that the items in court were not in the same condition as they were when they were found (TR 372). Thus, it became impossible for the jury to realize the full significance of the difference in the condition of the exhibits since they were never permitted to see them in the same manner in which they were found.

The importance of the substantial difference in the evidence presented at trial is accentuated when this is placed in light of Point III on appeal because it makes the infringements upon the constitutional rights of the Petitioner greater in light of the circumstances.

CONCLUSION

21 U.S.C. §811 should be declared unconstitutional in that it is an unlawful delegation of legislative authority. The right to determine criminal penalties should not be delegated to the prosecutor of those crimes where substantial and specific guidelines are not declared in the delegation of that authority.

The Petitioner was acquitted on the charge of conspiracy. Since he was not found in possession of any illegal substance, the charge of aiding and abetting in the possession of an illegal substance should also have been dismissed. This is further substantiated by the fact that Petitioner's constitutional rights were violated when evidence in a different condition than when originally seized was presented at trial without first being connected directly to the Petitioner by a witness who was available at trial and who could have testified on that issue.

For the foregoing reasons, Petitioner respectfully urges this Petition for Writ of Certiorari to be granted.

Respectfully submitted,

S. DAVID JAFFE
GRUSMARK, JAFFE, KARTEN, P.A.
3628 NE Second Avenue
Miami, Florida 33137

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a typewritten copy of the foregoing Petition for Writ of Certiorari with Appendix, printed copies to follow, was this 17th day of March, 1976, mailed to ROBERT A. BOAS, Assistant United States Attorney, 402 Old Post Office Building, Post Office Box 912, Atlanta, Georgia 30301.

S. DAVID JAFFE

APPENDIX

UNITED STATES COURT OF APPEALS
Fifth Circuit
Office of the Clerk

February 19, 1976

TO ALL COUNSEL OF RECORD

No. 74-3989 — USA v. David John Busard and Charles David Meyer

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

by SUSAN M. GRAVARO
Deputy Clerk

/smg

cc: Mr. William D. Smith
Mr. Milton E. Grusmark
Mr. John M. Turner, Jr.
Mr. Robert A. Boas

* * *

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * *

APPENDIX A

United States Court of Appeals,
Fifth Circuit.

No. 74-3989.

UNITED STATES of America,
Plaintiff-Appellee,
v.

David John BUSARD and Charles David Mayer,
Defendants-Appellants.

Dec. 5, 1975.

Defendants were convicted in the United States District Court for the Northern District of Georgia, Richard C. Freemand, J., of knowingly and wilfully possessing cocaine with intent to distribute and they appealed. The Court of Appeals held that the indictment was not duplicitous; that an agent's inadvertent revelation to the jury that one defendant had previously been arrested did not prejudice defendants' right to a fair trial, in view of the trial court's instruction to the jury to disregard and its polling the jury to ascertain whether any jurors felt that they could not disregard it; and that the cocaine seized by narcotics agents was properly introduced into evidence.

Affirmed.

1. Indictment and Information —125(3)

Indictment charging that defendants, aided and abetted by each other, knowlingly and intentionally did possess with intent to distribute a controlled substance, was not duplicituos and did not charge defendants with "aiding and abetting"; the language was merely specification of manner in which defendants were guilty of substantive offense of unlawful possession. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1); Fed.Rules Crim.Proc. rule 7(c)(1), 18 U.S.C.A.

2. Indictment and Information —196(7)

Objection that indictment was duplicitous was waived where it was not made prior to trial. Fd.Rules Crim.Proc. rule 12(b)(2), 18 U.S.C.A.

3. Criminal Law —1169.5(3)

In prosecution for possession of controlled substance with intent to distribute, narcotics agent's inadvertent revelation to jury that one defendant had previously been arrested did not prejudice defendants' right to fair trial, in view of trial court's instruction to jury to disregard and trial court's polling jury to ascertain whether any juror felt that he or she could not disregard it; moreover, there was such abundance of inculpatory evidence that harmless error rule applied. Fed.Rules Crim.Proc. rule 52(a), 18 U.S.C.A.

4. Criminal Law —404(4)

Cocaine seized by narcotics agents was properly introduced into evidence at trial for knowingly and wilfully possessing cocaine with intent to distribute, in view of fact that there was rational basis by which jury could have found that cocaine was connected to defendants. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1).

Appeals from the United States District Court for the Northern District of Georgia.

Before JONES, WISDOM, and AINSWORTH, Circuit Judges.

PER CURIAM:

Busard and Meyer, defendants-appellants, were convicted of knowingly and willfully possessing with intent to distribute a controlled substance, cocaine, in violation of 21 U.S.C. § 841(a)(1).

[1,2] The contention on appeal that the indictment is duplicitous is without merit. The indictment, in pertinent part, reads as follows:

> Busard and Meyer, aided and abetted by each other, knowingly and intentionally did possess with intent to distribute a controlled substance....

The indictment did not charge the defendants with "aiding and abetting"; this language is merely a specification

of the manner in which the defendants were guilty of the substantive offense of unlawful possession. As such, the use of this language is permitted by F.R.Crim.P. 7(c)(1). United States v. Bullock, 5 Cir. 1971, 451 F.2d 884, 888; United States v. Duke, 4 Cir. 1969, 409 F.2d 669, 671. Moreover, an objection of this nature, which was not made before the trial, is waived. F.R.Crim.P. 12(b)(2); United States v. Williams, 5 Cir. 1953, 203 F.2d 572, 573, cert. denied, 346 U.S. 822, 74 S.Ct. 37, 98 L.Ed. 347.

[3] Busard contends that an agent's inadvertent revelation to the jury, showing that Busard had previously been arrested, prejudiced their right to a fair trial. The trial court instructed the jury to disregard the statement about Busard's arrest and polled the jury to ascertain whether any juror felt that he or she could not disregard it.[1] Moreover, there was such an abundance of inculpatory

[1]The Court gave the following instruction:
The Court: Ladies ad gentlemen, the statement of Mr. Banks, formerly special agent with the Drug Enforcement Administration, concerning the fingerprint record and other information furnished, allegedly, by the Federal Bureau of Investigation relating to the Defendant Dave John Busard has absolutely nothing to do with the Defendant Charles David Meyer, first of all. Secondly, ladies and gentlemen, with respect to the Defendant Mr. Busard, anything else to do with the case, I instruct you to disregard completely the testimony of Mr. Banks with respect to that F.B.I. identification record. If there is any juror who feels that he or she cannot completely remove that testimony from her or his mind and disregard it absolutely, completely, the same as if it had never been stated, if there is anybody whose total objectivity with regard to this particular aspect of the case would in any way be impaired. I want you to raise your hand right this minute. I take it from that, then, that the jury understands that they are to completely disregard Mr. Banks' testimony with regard to that identification record, and further, that it has absolutely nothing to do with the Government's case against Mr. Meyer. Does everyone understand that? Has anyone got any problem? Is there anyone who can't completely forget about it and disregard it absolutely? All right, Mr. Smith.

evidence that the harmless error rule applies, F.R.Crim.P. 52(a); United States v. Ratner, 5 Cir. 1972, 464 F.2d 169.

[4] Both appellants argue that the cocaine seized by narcotics agents was improperly introduced into evidence. The Court finds, however, that there was a rational basis by which the jury could have found that the cocaine was connected to the defendants. See United States v. Montalvo, 2 Cir. 1960, 271 F.2d 922. The evidence was properly admitted.

The Court has considered all the other issues the appellants raised; each lacks sufficient merit to be discussed.

The judgments are affirmed.

APPENDIX B

ARTICLE I

Section 1

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

* * *

(1) add to such a schedule or transfer between such schedules any drug or other substance if he—

(A) finds that such drug or other substance has a potential for abuse, and

(B) makes with respect to such drug or other substance the findings prescribed by subsection (b) of section 812 of this title for the schedule in which such drug is to be placed; or

(2) remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule.

* * *

Evaluation of drugs and other substances

(b) The Attorney General shall, before initiating proceedings under subsection (a) of this section to control a drug or other substance or to remove a drug or other substance entirely from the schedules, and after gathering the necessary data, request from the Secretary a scientific

and medical evaluation, and his recommendations, as to whether such drug or other substance should be so controlled or removed as a controlled substance. In making such evaluation and recommendations, the Secretary shall consider the factors listed in paragraphs (2), (3), (6), (7), and (8) of subsection (c) of this section and any scientific or medical considerations involved in paragraphs (1), (4), and (5) of such subsection. The recommendations of the Secretary shall include recommendations with respect to the appropriate schedule, if any, under which such drug or other substance should be listed. The evaluation and the recommendations of the Secretary shall be made in writing and submitted to the Attorney General within a reasonable time. The recommendations of the Secretary to the Attorney General shall be binding on the Attorney General as to such scientific and medical matters, and if the Secretary recommends that a drug or other substance not be controlled, the Attorney General shall not control the drug or other substance. If the Attorney General determines that these facts and all other relevant data constitute substantial evidence of potential for abuse such as to warrant control or substantial evidence that the drug or other substance should be removed entirely from the schedules, he shall initiate proceedings for control or removal, as the case may be, under subsection (a) of this section.

§ 812. Schedules of controlled substances—
Establishment

(a) There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established

by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after the date of enactment of this subchapter and shall be updated and republished on an annual basis thereafter.

Placement on schedules; findings required

(b) Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on the effective date of this part, and except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless the findings for such schedule are made with respect to such drug or other substance. The findings required for each of the schedules are as follows:

(1) Schedule I.—

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has no currently accepted medical use in treatment in the United States.

(C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

(2) Schedule II.—

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.

(C) Abuse of the drug or other substances may lead to severe psychological or physical dependence.

(3) Schedule III.—

(A) The drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.

(4) Schedule IV.—

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule III.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule III.

(5) Schedule V.—

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule IV.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule IV.

Initial schedules of controlled substances

(c) Schedules I, II, III, IV, and V shall, unless and until amended pursuant to section 811 of this title, consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated:

Schedule I

(a) Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence

of such isomers, esters, ethers, and salts is possible within the specific chemical designation:

(1) Acetylmethadol.
(2) Allylprodine.
(3) Alphacetylmathadol.
(4) Alphameprodine.
(5) Alphamethadol.
(6) Benzethidine.
(7) Betacetylmethadol.
(8) Betameprodine.
(9) Betamethadol.
(10) Betaprodine.
(11) Clonitazene.
(12) Dextromoramide.
(13) Dextrorphan.
(14) Diampromide.
(15) Diethylthiambutene.
(16) Dimenoxadol.
(17) Dimepheptanol.
(18) Dimethylthiambutene.
(19) Dioxaphetyl butyrate.
(20) Dipipanone.
(21) Ethylmethylthiambutene.
(22) Etonitazene.
(23) Etoxeridine.
(24) Furethidine.
(25) Hydroxypethidine.
(26) Ketobemidone.
(27) Levomoramide.
(28) Levophenacylmorphan.
(29) Morpheridine.
(30) Noracymethadol.
(31) Norlevorphanol.

(32) Normethadone.
(33) Norpipanone.
(34) Phenadoxone.
(35) Phenampromide.
(36) Phenomorphan.
(37) Phenoperidine.
(38) Piritramide.
(39) Proheptazine.
(40) Properidine.
(41) Racemoramide.
(42) Trimeperidine.

(b) Unless specifically excepted or unless listed in another schedule, any of the following opium derivatives, their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Acetorphine.
(2) Acetyldihydrocodeine.
(3) Benzylmorphine.
(4) Codeine methylbromide.
(5) Codeine-N-Oxide.
(6) Cyprenorphine.
(7) Desomorphine.
(8) Dihydromorphine.
(9) Etorphine.
(10) Heroin.
(11) Hydromorphinol.
(12) Methyldesorphine.
(13) Methylhydromorphine.
(14) Morphine methylbromide.
(15) Morphine methylsulfonate.

(16) Morphine-N-Oxide.
(17) Myrophine.
(18) Nicocodeine.
(19) Nicomorphine.
(20) Normorphine.
(21) Pholcodine.
(22) Thebacon.

(c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) 3, 4-methylenedioxy amphetamine.
(2) 5-methoxy-3, 4-methylenedioxy amphetamine.
(3) 3, 4, 5-trimethoxy amphetamine.
(4) Bufotenine.
(5) Diethyltryptamine.
(6) Dimethyltryptamine.
(7) 4-methyl-2, 5-dimethoxyamphetamine.
(8) Ibogaine.
(9) Lysergic acid diethylamide.
(10) Marihuana.
(11) Mescaline.
(12) Peyote.
(13) N-ethyl-3-piperidyl benzilate.
(14) N-methyl-3-piperidyl benzilate.
(15) Psilocybin.
(16) Psilocyn.
(17) Tetrahydrocannabinols.

Schedule II

(a) Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate.

(2) Any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in clause (1), except that these substances shall not include the isoquinoline alkaloids of opium.

(3) Opium poppy and poppy straw.

(4) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine.

(b) Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts, and salts

of isomers, esters, and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:

(1) Alphaprodine.
(2) Anileridine.
(3) Bezitramide.
(4) Dihydrocodeine.
(5) Diphenoxylate.
(6) Fentanyl.
(7) Isomethadone.
(8) Levomethorphan.
(9) Levorphanol.
(10) Metazocine.
(11) Methadone.
(12) Methadone-Intermediate, 4-cyano-2-dimethylamino-4, 4-diphenyl butane.
(13) Moramide-Intermediate, 2-methyl-3-morpholino-1, 1-diphenyl-propane-carboxylic acid.
(14) Pethidine.
(15) Pethidine-Intermediate-A, 4-cyano-1-methyl-4-phenylpiperidine.
(16) Pethidine-Intermediate-B, ethyl-4-phenylpiperidine-4-carboxylate.
(17) Pethidine-Intermediate-C, 1-methyl-4-phenylpiperidine-4-carboxylic acid.
(18) Phenazocine.
(19) Piminodine.
(20) Racemethorphan.
(21) Racemorphan.

(c) Unless specifically excepted or unless listed in another schedule, any injectable liquid which con-

tains any quantity of methamphetamine, including its salts, isomers, and salts of isomers.

Schedule III

(a) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system:

(1) Amphetamine, its salts, optical isomers, and salts of its optical isomers.

(2) Phenmetrazine and its salts.

(3) Any substance (except an injectable liquid) which contains any quantity of methamphetamine, including its sales, isomers, and sales of isomers.

(4) Methylphenidate.

(b) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system:

(1) Any substance which contains any quantity of a derivative of barbituric acid, or any salt of a derivative of barbituric acid.

(2) Chorhexadol.
(3) Glutethimide.
(4) Lysergic acid.
(5) Lysergic acid amide.
(6) Methyprylon.
(7) Phencyclidine.
(8) Sulfondiethylmethane.
(9) Sulfonethylmethane.
(10) Sulfonmethane.

(c) Nalorphine.

(d) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, or any salts thereof:

(1) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium.

(2) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(3) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium.

(4) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(5) Not more than 1.8 grams of dihydrocodeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(6) Not more than 300 milligrams of ethylmorphine per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(7) Not more than 500 milligrams of opium per 100 milliliters or per 100 grams, or not more than 25 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(8) Not more than 50 milligrams of morphine per 100 milliliters or per 100 grams with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

Schedule IV

(1) Barbital.
(2) Chloral betaine.
(3) Chloral hydrate.

(4) Ethchlorvynol.
(5) Ethinamate.
(6) Methohexital.
(7) Meprobamate.
(8) Methylphenobarbital.
(9) Paraldehyde.
(10) Petrichloral.
(11) Phenobarbital.

Schedule V

Any compound, mixture, or preparation containing any of the following limited quantities of narcotic drugs, which shall include one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone:

(1) Not more than 200 milligrams of codeine per 100 milliliters or per 100 grams.

(2) Not more than 100 milligrams of dihydrocodeine per 100 milliliters or per 100 grams.

(3) Not more than 100 milligrams of ethylmorphine per 100 milliliters or per 100 grams.

(4) Not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit.

(5) Not more than 100 milligrams of opium per 100 milliliters or per 100 grams.

Stimulants or depressants containing active medicinal ingredients: exception

(d) The Attorney General may by regulation except any compound, mixture, or preparation containing any depressant or stimulant substance in paragraph (a) or (b) of schedule III or in schedule IV or V from the application of all or any part of this subchapter if (1) the compound, mixture, or preparation contains one or more active medicinal ingredients not having a depressant or stimulant effect on the central nervous system, and (2) such ingredients are included therein in such combinations, quantity, proportion, or concentration as to vitiate the potential for abuse of the substances which do have a depressant or stimulant effect on the central nervous system.

Pub.L. 91-513, Title II, § 202, Oct. 27, 1970, 84 Stat. 1247.

* * *

PART D.—OFFENSES AND PENALTIES

§ 841. Prohibited acts A—Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 5

years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine of not more than $10,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine of not more than $20,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least one year in addition

to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $5,000, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more than $10,000, or both.

(4) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in subsections (a) and (b) of section 844 of this title.

Special parole term

(c) A special parole term imposed under this section or section 845 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A spe-

cial parole term provided for in this section or section 845 of this title shall be in addition to, and not in lieu of, any other parole provided for by law.

Pub.L. 91-513, Title II, § 401, Oct. 27, 1970, 84 Stat. 1260.

* * *

§ 844. Penalty for simple possession; conditional discharge and expunging of records for first offense

(a) It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. Any person who violates this subsection shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $5,000, or both, except that if he commits such offense after a prior conviction or convictions under this subsection have become final, he shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more than $10,000, or both.

(b)(1) If any person who has not previously been convicted of violating subsection (a) of this section, any other provision of this subchapter or subchapter II of this chapter, or any other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, is found guilty of a violation of subsection (a) of this section after trial or upon a plea of guilty, the court may, without entering a judgment of guilty and with the consent of such person, defer further proceedings and place him on probation upon such reasonable conditions as

it may require and for such period, not to exceed one year, as the court may prescribe. Upon violation of a condition of the probation, the court may enter an adjudication of guilt and proceed as otherwise provided. The court may, in its discretion, dismiss the proceedings against such person and discharge him from probation before the expiration of the maximum period prescribed for such person's probation. If during the period of his probation such person does not violate any of the conditions of the probation, then upon expiration of such period the court shall discharge such person and dismiss the proceedings against him. Discharge and dismissal under this subsection shall be without court adjudication of guilt, but a nonpublic record thereof shall be retained by the Department of Justice solely for the purpose of use by the courts in determining whether or not, in subsequent proceedings, such person qualifies under this subsection. Such discharge or dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime (including the penalties prescribed under this part for second or subsequent convictions) or for any other purpose. Discharge and dismissal under this section may occur only once with respect to any person.

(2) Upon the dismissal of such person and discharge of the proceedings against him under paragraph (1) of this subsection, such person, if he was not over twenty-one years of age at the time of the offense, may apply to the court for an order to expunge from all official records (other than the nonpublic records to be retained by the Department of Justice under paragraph (1)) all recordation relating to his arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. If the court deter-

mines, after hearing, that such person was dismissed and the proceedings against him discharged and that he was not over twenty-one years of age at the time of the offense, it shall enter such order. The effect of such order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or indictment or information. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of him for any purpose.

Pub.L. 91-513, Title II, § 404, Oct. 27, 1970, 84 Stat. 1264.

* * *

§ 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Pub.L. 91-513, Title II, § 406, Oct. 27, 1970, 84 Stat. 1265.

* * *

§ 952. Importation of controlled substances—Controlled substances in schedules I or II and narcotic drugs in schedules III, IV, or V; exceptions

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any

controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that—

(1) such amounts of crude opium and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substance in schedule I or II or any narcotic drug in schedule III, IV, or V that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States—

(A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate, or

(B) in any case in which the Attorney General finds that competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 823 of this title,

may be so imported under such regulations as the Attorney General shall prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium.

Nonnarcotic controlled substances in schedules III, IV, or V

(b) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any nonnarcotic controlled substance in schedule III, IV, or V, unless such nonnarcotic controlled substance—

(1) is imported for medical, scientific, or other legitimate uses, and

(2) is imported pursuant to such notification or declaration requirements as the Attorney General may by regulation prescribe.

(c) In addition to the amount of coca leaves authorized to be imported into the United States under subsection (a) of this section, the Attorney General may permit the importation of additional amounts of coca leaves. All cocaine and ecgonine (and all salts, derivatives, and preparations from which cocaine or ecgonine may be synthesized or made) contained in such additional amounts of coca leaves imported under this subsection shall be destroyed under the supervision of an authorized representative of the Attorney General.

Pub.L. 91-513, Title III, § 1002, Oct. 27, 1970, 84 Stat. 1285.

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§ 960. Prohibited acts A—Unlawful acts

(a) Any person who—

(1) contrary to section 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substance,

(2) contrary to section 955 of this title, knowingly or intentionally brings or possesses on board a vessel, aircraft, or vehicle a controlled substance, or

(3) contrary to section 959 of this title, manufactures or distributes a controlled substance,

shall be punished as provided in subsection (b) of this section.

Penalties

(b) (1) In the case of a violation under subsection (a) of this section with respect to a narcotic drug in schedule I or II, the person committing such violation shall be imprisoned not more than fifteen years, or fined not more than $25,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall include a special parole term of not less than three years in addition to such term of imprisonment.

(2) In the case of a violation under subsection (a) of this section with respect to a controlled substance other than a narcotic drug in schedule I or II, the person committing such violation shall be imprisoned not more than five years, or be fined not more than $15,000, or both. If

a sentence under this paragraph provides for imprisonment, the sentence shall, in addition to such term of imprisonment, include (A) a special parole term of not less than two years if such controlled substance is in schedule I, II, III, or (B) a special parole term of not less than one year if such controlled substance is in schedule IV.

Special parole term

(c) A special parole term imposed under this section or section 962 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. The special term provided for in this section and in section 962 of this title is in addition to, and not in lieu of, any other parole provided for by law.

Pub.L. 91-513, Title III, § 1010, Oct. 27, 1970, 84 Stat. 1290.

* * *

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to

effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

No. 75-1379

In the Supreme Court of the United States

OCTOBER TERM, 1975

CHARLES DAVID MEYER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 3-7) is reported at 524 F. 2d 72.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1975, and a petition for rehearing with suggestion for rehearing *en banc* was denied on February 19, 1976 (Pet. App. 1-2). The petition for a writ of certiorari was filed on March 20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner may challenge, as an unconstitutional delegation of legislative power, the unexercised authority granted the Attorney General to modify the classification of cocaine as a controlled substance.

2. Whether petitioner's acquittal of a conspiracy charge precluded his conviction upon a substantive narcotics offense in a unitary trial.

3. Whether there was sufficient evidence to support petitioner's conviction for possession of cocaine with intent to distribute.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and was sentenced to thirteen years' imprisonment, to be followed by three years' special parole.[1] The court of appeals affirmed (Pet. App. 3-7).

The evidence showed that petitioner offered to pay John Graham one hundred dollars a day in return for permission to sell cocaine from Graham's house. Graham refused, although he did allow petitioner and co-defendants Busard and Levine to stay in his home temporarily. Petitioner instructed Busard to transport scales and a supply of what petitioner represented to Graham was cocaine from their car to Graham's house (App. 128-131).[2] Petitioner placed that substance in Graham's refrigerator (App. 131). Graham subsequently informed agents of the Drug Enforcement Administration of this activity (App. 128, 157-158).

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[1]Prior to submitting the case to the jury, the court entered a judgment of acquittal on behalf of petitioner and co-defendant Busard on a conspiracy count. Busard also was convicted of possessing cocaine with intent to distribute it. Co-defendant Stuart Levine pleaded guilty to possession of a controlled substance before trial.

[2]"App." refers to the Appendix in the court of appeals.

Acting upon this information, the D.E.A. agents obained a search warrant for Graham's house (App. 159). Upon its execution, they discovered approximately 94 grams of cocaine wrapped in plastic and aluminum foil stored in a plastic container in Graham's refrigerator (App. 143-145, 164).

ARGUMENT

1. Petitioner contends (Pet. 6) that his conviction must be overturned because 21 U.S.C. 811(a), under which the classification of cocaine as a controlled substance may be modified or deleted, is unconstitutional. He argues that the statute, which empowers the Attorney General, upon proper recommendation of the Secretary of Health, Education, and Welfare, to modify the schedules of controlled substances originally established by Congress, is an unconstitutional delegation of legislative power.

The court of appeals rejected an identical argument in *United States* v. *Westlake*, 480 F. 2d 1225, 1226 (C.A. 5), stating:

> Congress initially classified cocaine as a Schedule II Controlled Substance, and the Attorney General has neither rescheduled nor deleted cocaine from the list of controlled substances since the effective date of the statute. Appellant therefore has not been affected by whatever delegation of authority may be embodied in the statute.

Petitioner suggests (Pet. 6-7) that *Westlake* is distinguishable because certain other drugs have now been rescheduled. However, the status of cocaine, the substance petitioner was convicted of possessing, has not

been modified by the Attorney General; it remains a Schedule II controlled substance (see Pet. App. 16). Thus, this case presents no occasion to review the question petitioner raises.

2. Petitioner contends (Pet. 7) that the district court's entry of a judgment of acquittal on the conspiracy count precluded his conviction on the substantive narcotics count in this unitary trial.

In general, a conspiracy and the substantive offense which is its object are separate offenses, requiring proof of different facts. See, *e.g.*, *Iannelli* v. *United States*, 420 U.S. 770; *Sealfon* v. *United States*, 332 U.S. 575. The essence of the crime of conspiracy is an agreement to commit an unlawful act. Acquittal on the conspiracy charge does not necessarily resolve in defendant's favor any fact necessary to convict for the underlying offense, but simply may show that the prosecution failed to prove the existence of an agreement among the alleged conspirators.

Thus, petitioner is in error in arguing (Pet. 7-8) that, by acquitting him on the conspiracy count, the district court necessarily found him innocent of the substantive offense. See *Blanton* v. *United States*, 531 F. 2d 442 (C.A. 10), certiorari denied, April 19, 1976, No. 75-1072. In fact, the district court's action clearly indicates that it found no inconsistency, since it allowed the substantive count to go to the jury. So long as the evidence was in fact sufficient to support the conviction on the substantive count, petitioner has no grievance.

3. Petitioner contends (Pet. 8) that his conviction should be reversed because there was insufficient evidence linking him to the cocaine seized by the federal narcotics agents. However, the government introduced sufficient circumstantial evidence to establish beyond a reasonable

doubt that petitioner possessed that cocaine with intent to distribute it. *Glasser* v. *United States*, 315 U.S. 60, 80. A witness testified that shortly before departing for Graham's house, petitioner removed a container, which he said held cocaine, from his own refrigerator and stated that he intended to sell it (App. 54). Graham testified that petitioner placed a quantity of white powder stored inside a plastic container in his refrigerator and represented that it was cocaine. Upon its seizure, chemical analysis of the substance found in such a container inside Graham's refrigerator showed that it was cocaine. Thus, the court below properly found that there was a sufficient basis upon which the jury could have found beyond a reasonable doubt that the cocaine was connected to petitioner (Pet. App. 7). See *United States* v. *Montalvo*, 271 F. 2d 922 (C.A. 2).[3]

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[3]Petitioner further contends (Pet. 9-10) that the cocaine should not have been admitted into evidence because it was not then wrapped in the same manner as it had been when seized by federal narcotics agents. However, this argument merely challenges the jury's assessment of the credibility of Graham's testimony that he observed a white powder through the lid of the container when petitioner initially placed it in his refrigerator. The jury was fully informed that the cocaine was wrapped in plastic and aluminum foil at the time it was discovered by federal agents. This factual question concerning the reliability of Graham's testimony was decided adversely to petitioner by the jury and does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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